corporation, should not affect the chances of its success.

Aliens, Alien Corporations, and Foreign Governments

Under many circumstances, section 310 will apply to alien natural persons, to alien corporations, or to foreign governments. A brief outline of cases involving the constitutional rights of these potential plaintiffs is necessary before analyzing the constitutionality of section 310.

First, we face the question of whether aliens are less entitled to the protections of the Constitution than citizens. The Supreme Court does not generally support the idea that nonresident aliens have a First Amendment right to speak in America.[213] Several cases concerning the First Amendment rights of aliens—even resident aliens—suggest that those rights are curtailed whenever they conflict with the federal government's plenary power over immigration.[214] Other cases suggest that resident aliens are under the full protection of the Constitution, including the First Amendment.[215] The extent to which resident aliens may assert First Amendment rights against the government outside the immigration context is not resolved.

It would be surprising if a resident alien who owned a bookstore or a newspaper could be shut down by the national

213. Rose, *supra* note 194, at 1207.

214. *See* Note, *Silencing the Speech of Strangers: Constitutional Values and the First Amendment Rights of Aliens*, 81 GEO. L.J. 2073, 2074 (1993).

215. Bridges *v.* Wixon, 326 U.S. 135, 148 (1945); Kwong Hai Chew *v.* Colding, 344 U.S. 590, 596 n.5 (1953) ("[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendment and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens."); *see* Rose, *supra* note 194, at 1208-09.

government, other than in the exercise of the immigration power, under circumstances where the First Amendment would protect a U.S. citizen. The availability of the immigration power to the national government in such a case is a strong argument that the government does not need even broader general powers over resident aliens, particularly where exercise of those powers would erode the protections of the First Amendment. This consideration should incline a court to treat a constitutional challenge to section 310(b) brought by aliens as comparable to a challenge brought by a citizen; at least intermediate scrutiny would still apply, rather than the rational basis test employed in immigration cases.

An additional argument in favor of this view is that section 310(b) as applied to alien broadcasters (at least) implicates, not only the alien's rights, but also the rights of U.S. citizens to hear alien speech.[216] Where there has been no immigration issue, the Court has recognized these rights. In *Lamont* v. *Postmaster General*, the Court declared unconstitutional a statute that required addressees of "communist political propaganda" to send a reply card to the post office to receive such mail.[217] The "propaganda" in this case was a Chinese newspaper; the Court did not address the sender's rights, but found that to require the recipient to return a reply card to the post office violated the addressee's First Amendment rights. It would break new ground for a court to announce that it would not protect the rights of citizens to hear resident (or even nonresident) alien speech because the First Amendment must always take a back seat to the power of the national government to regulate trade or national security. It is not clear, however, whether an alien plaintiff could assert a citizen's rights in this context; a citizen

216. Rose, *supra* note 194, at 1205-06; J. Gregory Sidak, *Don't Stifle Global Merger Mania*, WALL ST. J., July 6, 1994, at A18.

217. Lamont *v.* Postmaster Gen., 381 U.S. 301 (1965); Rose, *supra* note 194, at 1205-07.

with a persuasive standing argument certainly could.[218]

It has not yet been settled to what extent an alien corporation's First Amendment rights would be recognized. Cases involving long-arm jurisdiction statutes as applied to alien corporations do establish that alien corporations have rights under the due process clause.[219]

By contrast, foreign governments and their official representatives are not protected by the First Amendment.[220] In *Mendelsohn* v. *Meese*, a district court rejected a First Amendment challenge to the Anti-Terrorism Act of 1987 (ATA), which was intended to curb the operation of the Palestine Liberation Organization.[221] The challenge was brought by U.S. citizens who claimed that the act, by barring them from obtaining funds from the PLO, prevented them from speaking on behalf of the PLO in a official or unofficial capacity. The court accepted the government's argument that *official* agents of a foreign government have no constitutional rights:

> A "foreign state lies outside the structure of the Union." The same is true of the PLO, an organization whose status, while uncertain, lies outside the constitutional system. It has never undertaken to abide by United States law or to "accept the constitutional plan." No foreign entity of its nature could be expected to do so . . . . It would make no sense to allow American citizens to invoke their constitutional rights in an effort to act as official representatives of

218. Meese *v.* Keene, 107 S. Ct. 1862 (1987).

219. *E.g.* Asahi Metal Indus. Co. *v.* Superior Ct. of Cal., 480 U.S. 102, 108 (1987).

220. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 254 (Columbia University Press 1972).

221. 695 F. Supp. 1474 (S.D.N.Y. 1988).

> foreign powers upon which the political branches have placed limits. Doing so would severely hamper the ability of the political branches to conduct foreign affairs. Any action harming the interests of a foreign power could otherwise be challenged in court as a violation of Americans' due process or First Amendment rights. Diplomatic relations could not be severed, for the foreign government could enlist American citizens to act as its representatives.[222]

The court, however, refused to extend this reasoning to those plaintiffs who claimed to be acting in an *unofficial* capacity, citing the Supreme Court's opinion protecting such an unofficial representative in *Communist Party* v. *Subversive Activities Control Board*.[223] The court in *Mendelsohn*, however, went on to reject the unofficial representative's First Amendment claims because it found the statute to be content-neutral and the government's asserted interest sufficiently important.

222. *Id.* at 1481 (quoting Principality of Monaco *v.* Mississippi, 292 U.S. 313, 330 (1934)); *see also* Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 518 (1987).

223. 367 U.S. 1, 95-96 (1961).

THE NATIONAL SECURITY RATIONALE

In *United States* v. *Robel*,[224] the Supreme Court declared a provision of the Subversive Activities Control Act[225] to be unconstitutional. In violation of the statute, a member of the Communist Party had remained in his job as a machinist at a shipyard after it had been designated a defense facility. Writing for the majority, Chief Justice Warren explained that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit."[226] Despite the concerns of Congress and the Executive Branch over "internal subversion," the Chief Justice said, such reasoning would defeat the purpose of creating a constitutional democracy in the first place:

> [T]his concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in its Constitution, and the most cherished of those ideal have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.[227]

224. 389 U.S. 258 (1967).
225. 64 Stat. 992 (1950) (codified at 50 U.S.C. § 784 (a)(1)(D)).
226. 389 U.S. at 263-64.
227. *Id.* at 264.

The Court was dismayed to find that the statute made no attempt to exempt individuals who might be "passive or inactive member[s] of a designated organization," or who might be unaware or disagree with the organization's unlawful aims, or who might "occupy a nonsensitive position in a defense facility."[228] The Court held that "because [the statute] sweeps indiscriminately across all types of association with Communist-action groups, without regard to the quality and degree of membership . . . it runs afoul of the First Amendment."[229] The Court might have said virtually the same thing about section 310 of the Communications Act.

The Effect of Bellicosity or Peace

National security has long been the asserted rationale for section 310. As chapter 2 documented, section 310 serves the national security objective of protecting the U.S. from foreign threats during time of war or national emergency.[230] The legislation principally reflected fears that radio stations within the U.S. could be used for point-to-point communications with the enemy. Before America's entry into World War I, German-controlled wireless stations on the Atlantic coast communicated with German vessels. This concern was foremost in the minds of senior Navy officers who lobbied Congress for the foreign ownership restrictions and established RCA as a government-controlled wireless company owned and managed by Americans. A second national security objective, which does not find nearly so much historical support for it as does the first, is the prevention of the dissemination of enemy propaganda during wartime. Despite the relatively slim historical support for such an objective, the

228. *Id.* at 266.

229. *Id.* at 262.

230. *See, e.g.*, *Hearings on S. 2910 Before the Senate Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 170 (1934).

proposition that Congress intended section 310(b) to prevent wartime propaganda is firmly fixed in the conventional wisdom surrounding the foreign ownership restrictions and is routinely cited by courts and the FCC.[231]

Some might argue also that section 310 addresses the danger of sabotage, as do other restrictions on foreign direct investment.[232] This argument, however, is conspicuously absent from the legislative history of section 310 and its predecessor provisions in the Radio Acts of 1912 and 1927. Indeed, if alien sabotage of the telecommunications network, rather than alien control of the wireless portion of it, were a concern to Congress, then the foreign ownership restrictions would have covered wireline telephony and telegraphy, which are far more vulnerable than wireless to destruction of physical infrastructure, such as wires and switches. To the contrary, Congress confined section 310 to wireless communications. Also, one must ask why aliens would want to invest in communications assets of any kind with the intention of destroying them in wartime.

In short, the national interest in restricting the electronic speech of aliens has diminished with the end of the Cold War. The current level of international security, despite regional conflicts in Africa and the Balkans, is far removed from a condition of world war, in which a formidable enemy with superior weaponry is consistently attacking civilian shipping and transportation. New risks to national security, of course, may arise and justify relatively burdensome regulation of foreign ownership of wireless. A handful of rogue nations—Iran, Iraq, Libya, and North Korea—remains hostile to the U.S. But that condition does not justify turning away foreign investment from the many nations that are America's allies. Indeed, to apply the foreign ownership restrictions to

231. *E.g.*, Noe *v.* FCC, 260 F.2d 739, 741-42 (D.C. Cir. 1958).

232. Elliot L. Richardson, *U.S. Policy Toward Foreign Investment: We Can't Have It Both Ways*, 4 AM. U.J. INT'L L. & POL'Y 281, 307-08 (1989).

investment from a friendly nation is not even consistent with the rationale routinely imputed to Congress for the statute's enactment.

General Strength of Interest in National Security

If national security is the asserted government purpose of section 310, the next question is whether that interest is content-related or content-neutral. Clearly, concern with propaganda is content-related. But concern with opportunities for espionage appear to be content-neutral. Depending on the circumstances, then, the asserted government interest must be either "important" or "compelling."

Such goals are important and have even been deemed compelling during wartime.[233] But they lose their urgency during times of peace. The justification for the foreign ownership restrictions is wartime xenophobia and fear of subversion. With the end of the Cold War, there is less basis than in 1934 to suspect foreigners when they speak to Americans; and, with the growth of international communication over the Internet, there is less reason to believe that Americans would uncritically accept propagandistic ideas. Furthermore, it would prove too much to convert the national security interest to one of "preparedness" on the rationale that the outbreak of war cannot be predicted, for that logic would justify any manner of infringement on civil liberties. In short, a court could reasonably conclude that the national security rationale for section 310(b) fails both intermediate and strict scrutiny when it is applied in undifferentiated form during times of peace.

233. Korematsu *v.* United States, 323 U.S. 214 (1944).

The Fit Between National Security Interests and Section 310 Generally

If national security is nonetheless deemed an important or even compelling interest, we must next determine whether the foreign ownership restrictions are narrowly tailored to meet national security concerns. In particular, are there alternative means available that would restrict speech to a lesser extent? Clearly, yes.

The foreign ownership restrictions are both overinclusive and underinclusive. They apply with equal force to *all* foreigners, whether citizens of friendly or hostile nations. As a result, the U.S. limits the investments of Britons to the same extent that it limits North Koreans and Iraqis. If the restrictions were narrowly tailored, they would distinguish among nations and restrict only citizens of those states that pose a realistic threat to our national security. If a nation, such as North Korea or Iraq, is a security threat to the U.S., it would not be in the public interest to allow one of its citizens to own *any* fraction of the stock in a U.S. radio license. Yet, section 310(b) would freely allow such a person (through corporate subsidiaries) to acquire 25 percent of the U.S. firm. Conversely, narrowly tailored foreign ownership restrictions would exempt, or at least treat more favorably, nations with which the U.S. is allied in security treaties such as NATO. Section 310(b) makes no attempt to do so. It is not reasonable to characterize a nation in whose defense the U.S. is bound by treaty to commit military forces as a nation whose citizens, for purposes of section 310(b), should be restricted on national security grounds in their ability to make direct investments in U.S. radio licenses.

The foreign ownership restrictions are also overinclusive and underinclusive in the sense that they do not take into account the convergence of telecommunications technologies that has occurred and will continue to occur. The concern over foreign propaganda was directed at broadcasting

as it existed in the 1930s: an omnidirectional, point-to-multipoint radio transmission. Today, however, multichannel video is (or soon will be) available over wires from cable systems and telephone companies. Yet these wireline media are exempt from the foreign ownership restrictions. At the same time, cellular telephony—which was invented in the 1940s and has become a radio-based substitute for wireline telephony—poses no threat of being used for mass propaganda yet *is* subject to section 310(b). The blanket restrictions in section 310(b) are hopelessly outdated and fail to differentiate adequately among the various uses for radio technologies that have emerged since 1934.

The statutory means exist to protect the national security in a manner less restrictive of free speech than the foreign ownership restrictions. Section 606 of the Communications Act empowers the President to seize communications facilities during wartime.[234] Woodrow Wilson exercised such power, conferred upon him by section 2 of the Radio Act of 1912,[235] immediately upon America's entry into World War I.[236] This safeguard alone should be sufficient to protect the nation from propaganda and improper political influence.

If his power of confiscation is not enough, the President also has the unconditional power, under the Alien Enemy Act of 1798, to order summarily the arrest, internment, and removal of any enemy alien during a declared war.[237] He also may impose conditions on an enemy alien's continued stay in the U.S. During the world wars, Presidents

234. 47 U.S.C. § 606.

235. 37 Stat. 302, § 2 (1912).

236. Exec. Order (Apr. 6, 1917), *reprinted in* 17 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 8241; Exec. Order (Apr. 30, 1917), *reprinted in id.* at 8254.

237. Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577 (current version at 50 U.S.C. § 21).

Wilson and Roosevelt exercised these powers.[238] By June 30, 1942, the Department of Justice had supervised administrative hearings for 9121 cases, which resulted in the internment of 4132 of the 900,000 persons identified by the Department to be enemy aliens on December 7, 1941.[239]

Finally, the national security goals of section 310 could be equally met by an FCC regulation requiring the transfer of any foreign investment exceeding the current benchmarks to an American trustee during wartime or national emergency. The FCC already has a similar trustee mechanism to accommodate the transfer-of-control issues raised by hostile tender offers for FCC licenses.[240] As part of a similar policy to address foreign ownership, the FCC could simply require the foreign investor to designate in advance a person who could immediately serve as trustee of the foreigner's investment in the event of a national emergency.

238. *See* J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1413–19 (1992).

239. *Id.* (citing 1942 ATT'Y GEN. ANN. REP. 14; 1943 ATT'Y GEN. ANN. REP. 9).

240. Tender Offers and Proxy Contests, Policy Statement, MM Dkt. No. 85-218, 59 Rad. Reg. 2d (P&F) 1536 (1986), *appeal dismissed sub nom.* Office of Communication of the United Church of Christ *v.* FCC, 826 F.2d 101 (D.C. Cir. 1987). Ordinarily, applications for approval of substantial transfers of control of FCC licensees are governed by 47 U.S.C. § 309(b). The FCC's tender offer policy statement fashioned a different, two-step procedure for tender offers. The first step involves a transfer of control from existing shareholders to a voting trustee pursuant to a short-form application subject to 47 U.S.C. § 309(f). The second step, which is planned to follow consummation of the transfer of control from the voting trustee, involves a transfer of control from the voting trustee to the tender offeror (which has designated the voting trustee for the first step) pursuant to a long-form application subject to 47 U.S.C. § 309(b). *See, e.g.*, CNCA Acquisition Corp., 3 F.C.C. Rcd. 6088 (1988).

Alternative Channels of Communications

If the foreign ownership restrictions pass these first two prongs of intermediate scrutiny, the third prong asks whether the restrictions preserve ample alternative channels of communication for foreigners. On their face, the restrictions preserve *no* alternatives. Compared to many industries, the telecommunications industry has relatively high entry barriers, and the foreign ownership restrictions raise them higher. Further, to the extent that ownership confers editorial ability, the restrictions grossly diminish foreigners' editorial capacity. Thus, the restrictions irreparably close the major source of telecommunication to foreigners.

TRADE RECIPROCITY AS AN UNENUNCIATED GOVERNMENT INTEREST

Section 310's limits on alien control of radio licenses also potentially present a collision between the First Amendment and the power of the national government over trade policy. The most likely form that this argument would take is a claim that section 310 imposes a crude version of reciprocity. A number of nations have enacted rules that restrict access of U.S. citizens and corporations to the nations' media outlets. When the FCC considered imposing a foreign ownership restriction on cable systems, proponents of the limit reminded the FCC that Canada had adopted strict limits on foreign ownership of its own cable systems.[241] In 1989, the European Communities (EC) adopted an *EC Directive Concerning the*

241. Amendment of Parts 76 and 78 of the Commission's Rules to Adopt General Citizenship Requirements for Operation of Cable Television Systems and for Grant of Station Licenses in the Cable Television Relay Service, Memorandum Opinion and Order, 77 F.C.C.2d 73, 76 ¶ 6 (1980) [hereinafter *Foreign Ownership of CATV Systems*].

Pursuit of Television Broadcasting Activities.[242] The directive obligates member states to reserve a majority of broadcast time for "European works."[243] Representatives of the U.S. decried this agreement as a form of protectionism and threatened to retaliate.[244]

Trade Policy and the Constitution

Conceivably, defenders of section 310 could argue that the foreign ownership limits represent a valid exercise of the national power over trade policy. After all, the national government restricts foreign participation in banking[245] and air transportation,[246] among other areas.

But telecommunications is different. Speech is protected by the First Amendment. In the immigration context, the national government's plenary powers over immigration policy have been held to override the normal operation of the First Amendment. One might argue that the same result should hold for the national government's power to regulate trade by the specific means employed by section 310. The Constitution, after all, does grant Congress the power to "regulate Commerce with foreign Nations."[247]

As a general matter, however, this argument proves too much. It would enable the government to enact broad, sweeping restraints on speech—restrictions on the importation of foreign books, for example—in the name of trade policy. And, unlike in the immigration context, portions of section 310 could directly apply to domestic corporations as well as

242. *See* Fred H. Cate, *The First Amendment and the International "Free Flow" of Information*, 30 VA. J. INT'L L. 371, 402–03 (1990).

243. *Id.*

244. *Id.* at 415.

245. 12 U.S.C. § 3105.

246. 49 U.S.C. §§ 1301–1557.

247. U.S. CONST. art. I, § 8.

aliens and alien corporations. Section 310(b)(3), for example, could be applied to a domestic corporation with a handful of alien directors. Finally, the congressional power to regulate trade with foreign nations is contained in the same sentence with the power to regulate trade among the several states. If Congress cannot use its power to regulate commerce among the several states to restrict speech, it is arbitrary to argue that Congress has the power to do so in the name of regulating commerce with foreign nations.

The better analysis would treat trade policy as just another government interest. Strong precedent supports this view. When foreign affairs laws or executive orders conflict with the rights of U.S. citizens, the citizen's free speech rights remain intact.[248]

Strength of the Government Interest

Unlike the argument from national security, the government's asserted interest in trade policy is content-neutral. At most, then, it might face intermediate scrutiny.

This does not mean, however, that the government could convincingly defend section 310 as a legitimate exercise in trade policy. There is no evidence in the legislative history through 1934, or from 1934 until 1995, that section 310 was ever intended to be an instrument of trade policy. It would be unconvincing, therefore, for the government to argue *post hoc* that section 310 in fact furthers a substantial government interest in trade policy. This kind of after-the-fact reasoning is unlikely to pass even a rational basis test.

Second, it is unlikely that the national government's interest in using section 310(b) as a bargaining chip in trade negotiations could amount to a substantial interest. If this is

248. Boos *v.* Barry, 485 U.S. 312, 321–29 (1988); New York Times Co. *v.* United States, 403 U.S. 713, 714 (1971) (*per curiam*).

not immediately clear in the context of the electronic media, it should help to recall the example of a national ban on foreign books. To take another example, suppose that the U.S. Trade Representative determined that denying American dealers of Lexus and Infiniti automobiles the opportunity to advertise in newspapers and over radio and television was an even more effective way of winning market-access concessions for U.S. automobiles and parts from the Japanese government than the threat of a 100 percent import duty. A restriction on speech does not become more permissible under the First Amendment simply because the government's interest has shifted from national security to trade policy.

Third, as a matter of trade policy, the arguments in favor of liberalizing the current foreign ownership provisions are stronger than tightening them. Historically, the U.S. has adopted a policy of defending freedom of speech worldwide.[249] As a practical matter, allowing more foreign investment strengthens competition in domestic markets, providing consumers with substantial benefits. For example, BT's investment of capital in MCI will allow MCI to spend $20 billion to upgrade its networks to provide expanded voice, video, and data communications.[250] Competition for ABC, NBC, and CBS came from Australia in the form of New Corp.'s investment in the creation of Fox Television.[251]

Means Employed

Some of the arguments made above apply equally well to show a poor fit between the restrictions in section 310 and trade policy. Section 310 does not sort friend from foe in the context of a trade war. Alternative instruments of trade policy are available, including means that do not restrict speech at

249. Cate, *supra* note 243, at 371–88.
250. MCI Comm. Corp., 9 F.C.C. Rcd. 3960, 3964 n.45 (1994).
251. Rose, *supra* note 194, at 1227.

all, such as imposing tariffs on Montrachet and BMWs, or arguing eternally in the face of European and Canadian stubbornness that American cultural imperialism is not to be feared. Although these alternatives might not seem as effective as those available to the government during wartime, they are probably at least as effective as section 310 would be.

In its current form, section 310 would be a very clumsy instrument for prying open foreign telecommunications markets to U.S. direct investment. Reciprocity essentially means restricting the access of foreigners to your market, ignoring the economic welfare of your own citizens, in the hope that the foreigners will turn on their own government, which has shown its willingness to ignore the economic welfare of its own citizens. So roundabout a means of solving the problem is likely to backfire.

The FCC itself emphasized, when considering in 1980 the adoption of such a policy for foreign investment in cable television, that reciprocity is just as likely to result in more restrictions all around than in a universal lessening of them. The FCC also noted that the most certain effect of adopting reciprocity would be to insulate domestic cable systems from competition:

> We do not believe a desire for reciprocity in international investment policies by itself provides an adequate basis for action on our part. Nor are we, in any case, in a position to know if such a policy on our part would in fact have the result intended or if, to the contrary, it would lead to increasing trade barriers in other areas . . . . There is no showing in this proceeding that a reciprocal agreement would improve communications service available in the United States. To the contrary, it seems likely that reciprocal treatment between the U.S. and Canada would merely reduce

> competition to provide cable television service in the U.S. . . . . At this time it is difficult for us to perceive how the television viewing public would benefit in any way from the regulation requested. Rather it would appear that such a restriction would merely promote the self interests of the domestic cable television industry at the expense of additional competitive alternatives for the public in the franchising process.[252]

Although not offered in the context of First Amendment litigation, the FCC's reasoning in 1980 nonetheless sheds light today on the dubious constitutionality of using section 310(b) as tool of trade policy. The possibility of showing a good fit between the intended result (the opening of markets overseas to direct investment by U.S. telecommunications firms) and the means chosen (the conditional authorization by the FCC of foreign direct investment in U.S. radio licensees) is negligible.

Application of the Standard of Review to the Foreign Ownership Restrictions

Consider now various hypothetical applications of the standard of review to the individual parts of section 310. We will first examine the constitutionality of section 310(a), and then proceed to each subsection of section 310(b).

252. *Foreign Ownership of CATV Systems*, 77 F.C.C.2d 73, 79 ¶ 13, 80 ¶ 15, 80 ¶ 18 (1980).

Section 310(a)

Section 310(a) imposes a blanket ban on all radio licensing of foreign governments and their representatives: "The station license required under this Act shall not be granted to or held by any foreign government or the representative thereof."[253] Because foreign governments and their official representatives enjoy no First Amendment rights, section 310(a) is constitutional as applied to these entities.

A U.S. citizen who speaks on behalf of a foreign entity in an *unofficial* capacity retains his First Amendment rights.[254] However, section 310(a) probably would not be applied to the unofficial representative of a foreign government. For instance, the FCC has ruled that it did not violate section 310(a) to grant a license to an honorary counsel of Bolivia, who received no compensation for his services from the Bolivian government.[255]

Should the FCC alter this interpretation, a court would almost certainly find the application of 310(a) to an unofficial representative to be unconstitutional under either intermediate or strict scrutiny. Even if such a representative were considered a security risk, the fit between the statute and the goal of preserving national security is very poor. The legislation makes no attempt to sort friends from foes. Legislation that requires persons who speak on behalf of foreign governments (officially or not) to register as an agent of a foreign government has been upheld, but courts upholding these requirements emphasize that the laws do not restrict speech, but only require disclosure of the agent's

253. 47 U.S.C. § 310(a).

254. *Mendelsohn*, 695 F. Supp. at 1481; *Communist Party*, 367 U.S. at 96.

255. Russell G. Simpson, 2 F.C.C.2d 640 (1966).

identity.[256] Section 310(a) is different. It operates as a complete ban on such speech.

We may thus conclude that section 310(a) is constitutional as applied to foreign governments and their official representatives. On the other hand, application of the bar to an unofficial representative, particularly a U.S. citizen, would be unconstitutional.

Section 310(b)(1) and 310(b)(2)

Section 310(b) generally prevents a "broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license"[257] from being held by any of the entities that the statute covers. Sections 310(b)(1) and 310(b)(2) apply the bar to the following entities:

> (1) any alien or the representative of any alien;
>
> (2) any corporation organized under the laws of any foreign government;[258]

First, consider application of section 310(b)(1) to a foreign private citizen, lawfully living in the U.S., who wishes to provide broadcast services, such as a Spanish-language radio

256. *Communist Party*, 367 U.S. at 97 (Subversive Activities Control Act does not prohibit speech); Attorney Gen. *v.* Covington & Burling, 411 F. Supp. 371, 376 (D.D.C. 1976) (FARA registration provisions require disclosure without burdening speech unnecessarily); United States *v.* Peace Info. Center, 97 F. Supp. 255, 262-63 (D.D.C. 1951) (FARA withstands First Amendment scrutiny because, although it requires registration, it does not regulate speech); United States *v.* Auhagen, 39 F. Supp. 590, 591 (D.D.C. 1941) (FARA does not prohibit distribution of propaganda but only requires disclosure of distributor).

257. 47 U.S.C. § 310(b).

258. *Id.* §§ 310(b)(1), (2).

station. Assuming that a court would treat the foreign corporation as it would a foreign natural person, this hypothetical also illustrates application of the standard of review to section 310(b)(2), which applies the ban on licensing to corporations organized under the laws of a foreign government.

The absurd rationales for distinguishing broadcast from the print media aside, the FCC's denial of a license to broadcast is analogous to content-based denial of permission to engage in leafletting. However, because of the uncertainty surrounding the extent to which aliens and alien corporations are entitled to the full protections of the First Amendment, we will not assume that sections 310(b)(1) and 310(b)(2) would face strict scrutiny. Nonetheless, these restrictions would fail even intermediate scrutiny.

If the asserted government interest is national security, how could it be an important interest in this hypothetical? *Even if* one accepts the view that the broadcaster's audience will believe whatever is transmitted (a bit of paternalism one would think could not attain the status of constitutional law, if listeners have any rights at all), the national security interest in this case is laughably weak in the absence of hard evidence that the alien has any hostile intention. For the same reason, the effect of the ban is grossly overbroad; the means is not at all tailored to the end. Arguably, there are alternative channels. The alien could buy a cable television system. But pointing out this alternative merely makes the total ban on the alien broadcaster seem more foolish and unnecessary if the objective of section 310(b) is to prevent foreign ideas from reaching a mass audience in the first place. Application of sections 310(b)(1) and 310(b)(2) to a foreign broadcaster would almost certainly be found unconstitutional.

Suppose instead that the alien wishes to provide common carriage services. Again, the national security interest is weak, as the FCC itself has admitted when approving waivers to provide common carrier service under

section 310(b)(4).[259] If, however, the asserted government interest is the prevention of sabotage, the interest is content-neutral and the restrictions may face only a rational basis test. Still remaining as open questions, however, would be whether it is rational to presume (1) that only foreigners are responsible for sabotage committed in the U.S., (2) that a foreigner will pay good money to invest in radio facilities so that he may destroy them in time of war or international crisis, and (3) that investment in a U.S. radio licensee gives a foreigner any greater opportunity to sabotage American telecommunications than he would have without making that investment. Experience and common sense give good cause to reject all of these presumptions as irrational. The FCC, for example, has quietly prosecuted a number of U.S. citizens for intentionally interfering with air traffic control communications. And, the bombing of the federal building in Oklahoma City in 1995 appears to be one in a long line of acts of terrorism or sabotage (including the Haymarket riot of 1886, the Wall Street explosion of 1924, and the Weathermen bombing at the University of Wisconsin during the Vietnam War) that were committed on American soil by Americans.

Finally, a common carrier may have difficulty persuading a court to recognize its First Amendment standing at all. The same reasoning would apply to an entity that sought to provide private aeronautical radio service for hire (not for its own use). The outcome of this analysis is uncertain.

On the other hand, suppose that the alien wanted to establish its own private carriage network for its own communications, by obtaining the sort of aeronautical fixed or mobile radio station denied it by section 310(b). Here, the alien wants to speak as well as to provide carriage facilities.

259. Upsouth Corp., 9 F.C.C. Rcd. 2130, 2131 ¶ 13 (1994); *MCI*, 9 F.C.C. Rcd. at 3964 ¶ 23; *see* Rose, *supra* note 194, at 1212.

As a constitutional matter, point-to-point carriage is at least as well protected as cable television, perhaps more so. In *Sable*, the Supreme Court concluded that restrictions on indecent dial-a-porn (as opposed to outright obscene dial-a-porn) were unconstitutional, employing a strict scrutiny test because the regulations were not content-neutral.[260]

Analyzing this restriction under even an intermediate level of scrutiny, there seems to be no substantial national security argument for denying all aliens such a license during peacetime. Again, the fit of the legislation is bad. Pointing out that the alien may opt for the alternative of hiring private carriage from a third party again highlights the weakness of the argument that this is a necessary national security measure. The third party is not likely to be monitoring conversations on its wavelengths to be certain they comport with the national interest. The application of section 310(b)(1) or 310(b)(2) in this circumstance is unconstitutional.

Finally, section 310(b)(1) might be applied to a U.S. citizen who is considered the representative of an alien. Here, the provision would almost certainly receive strict scrutiny. Again, the application of the section 310 ban in this case would also be unconstitutional, for the reasons indicated above.

Section 310(b)(3)—Seven Hills Revisited

Now, consider section 310(b)(3), which covers corporations arguably under the direct control of aliens. Its scope is "any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representatives thereof or by any

260. *Sable*, 492 U.S. at 124.

corporation organized under the laws of a foreign country."[261] If these corporations were organized under the laws of a foreign government, section 310(b)(2) would apply as well—if application of section 310(b)(2) were found unconstitutional, section 310(b)(3) would be as well.

However, section 310(b)(3) could apply to a corporation organized under the laws of the U.S., if it happened to have one alien officer or director. Again, suppose such a corporation sought to become a broadcaster. Application of section 310(b)(3) to such a case would plainly be unconstitutional. None of the cases suggesting that aliens are entitled to lesser First Amendment protection would apply—the plaintiff is *not* an alien. Again, the national security interest is weak. The legislation is hopelessly overbroad, making no effort to sort friend from foe. Again, pointing out the alternative of cable merely makes the law look sillier. The law must fail intermediate scrutiny and might even fail a rational basis test.

The same could be said for application of section 310(b)(3) in the case of a corporation of which more than one-fifth of the capital stock is owned or voted by aliens or by a alien corporation.

A stronger case might be made for the constitutionality of the application of section 310(b)(3) to a corporation of which more than one-fifth of the capital stock is owned or voted by a foreign government. Here, the national security interest seems stronger. Still, however, the "fit" of the legislation seems poor, with no attempt made to sort friend from foe. In this case, application of section 310(b)(3) would be constitutional only if the corporation were somehow considered an official representative of the foreign government.

Suppose that a corporation covered by section

261. 47 U.S.C. § 310(b)(3).

310(b)(3) sought to become a common carrier or a private carrier for hire. As with sections 310(b)(1) and 310(b)(2), providing this sort of distribution facility might not yet count as protected speech. The case law must catch up with the technology.

Finally, as with sections 310(b)(1) and (2), this provision is probably unconstitutional as applied to a corporation covered by section 310(b)(3) who seeks to become a private aeronautical carrier on its own behalf.

Section 310(b)(4)

Section 310(b)(4) applies to corporations controlled by alien-tainted holding companies, as follows:

> (4) any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a federal government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.[262]

As discussed in chapter 3, the plain language of the statute does not operate as an absolute bar to a U.S. holding company of a foreign investor owning more than a 25 percent interest in a radio licensee subject to section 310(b). Indeed, the provision should not operate as a bar at all, unless and until the FCC affirmatively shows that the foreign presence in

262. *Id.* § 310(b)(4).

the holding company poses a genuine danger to the public interest.

As written, section 310(b)(4) is probably constitutional as applied to *any* of the entities it covers. Because the FCC is apparently required to make affirmative findings before the provision operates as a bar to foreign investment, section 310(b)(4) should not operate as a bar in any case where the national security interest is weak or where there is no proper fit.

The problem, however, is that the FCC has not applied the statute as it is written. As discussed in chapter 3, the FCC has created a presumption that the public interest will not be served by any company that exceeds the limits of section 310(b)(4); any company that does exceed those limits must apply for a waiver. And, as chapter 4 documented, the waiver process is a sticky, expensive affair. In the case of a broadcaster, forcing a company to jump through these hoops is akin to requiring special licensing for a publisher or leafletter. Although the waiver might ultimately be granted, there is always a chill on speech. The tax on advertising revenues invalidated in *Grosjean* was invalidated as an attack on a newspaper's ability to raise funds.[263] The FCC's waiver process is properly viewed as a tax on media corporations that wish to raise investment capital abroad.[264]

Assuming that national security is the asserted interest, the FCC's interpretation of section 310(b)(4) would face at least intermediate scrutiny. Because of the weakness of the national security interest and the bad fit, the FCC's

263. The Court held that a tax on the advertising revenues of newspapers with a circulation of more than 20,000 violated the First Amendment. Justice Sutherland, writing for the majority, described the law as a double restraint on the press: "First, its effect is to curtail the revenues realized from advertising; and, second, its direct tendency is to restrict circulation." *Grosjean*, 297 U.S. at 244–55.

264. Rose, *supra* note 194, at 1209–10.